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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

NANA KIRK,  
Plaintiff and Respondent,  
v.  
MATTHEW OWEN,  
Defendant and Appellant.

A124099  
(Alameda County  
Super. Ct. No. BG08408995)

Matthew Owen appeals a restraining order issued under Code of Civil Procedure section 527.6<sup>1</sup> that requires him to stay at least 25 yards away from his neighbor Nana Kirk and her three-year-old son. We conclude sufficient evidence satisfied the statutory requirements for issuance of the order, and affirm.

**FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

Owen and Kirk live on the same street, approximately one block apart. In the summer of 2007, Owen was walking his dog “Bailey” off leash on a public path that runs past Kirk’s home. The dog defecated on Kirk’s property, and then ran up Kirk’s driveway and collided with her then two-year-old son, almost knocking him down. When Kirk told Owen to keep the dog away from her son because she was afraid the dog would knock the toddler over, Kirk laughed, said the dog was friendly, and walked away

<sup>1</sup> All further statutory references are to the Code of Civil Procedure.

<sup>2</sup> The factual background is summarized mainly from the declarations submitted by the parties which were before the trial court when it entered the restraining order.

without collecting the dog's feces from Kirk's property. Kirk collected the feces and later took them to Owen in a bag.

A week or two later, Kirk's husband watched Owen permit his dog to run off leash and defecate in the ivy on public property next to Kirk's house. Kirk's husband asked Owen to clean up after his dog, and Owen seemed to agree that he would do so in the future. A week later, Kirk saw Owen again permit the dog to defecate in the ivy and leave without cleaning it up. About a week after that, Kirk and her husband saw Owen's wife walking the dog on a leash, and she cleaned up after the dog when it defecated. They thanked her, and explained that Owen did not clean up after the dog. A week or two later, Kirk photographed Owen as he walked his dog off leash on the adjoining public property. Owen immediately walked away from the ivy where the dog seemed to be preparing to defecate.

Months later, in the summer of 2008, Kirk's tenant saw Owen fling his dog's feces into the ivy after the dog defecated on a public path. The following week, Kirk's husband saw Owen's wife walking the dog on the public path. He explained what their tenant saw the previous week, and said he would appreciate it if Owen walked the dog on its leash and cleaned up after it the way she did. About an hour later, Owen confronted Kirk's husband at a coffee shop and instructed him not to talk to Owen's wife. Owen threatened to leave dog feces on Kirk's porch, and shouted out of his car window as he drove away.

When Kirk learned of this incident, she felt threatened and afraid, and asked her husband to report it to the police. The officer who took the report spoke with Owen and his wife. The officer told Kirk's husband that Owen's wife did not want him to speak to her, and that any further contact with the Owens should go through the police. Later that day, Owen left a note on Kirk's truck when it was parked in the driveway of her home. The note disclaimed any intention to threaten Kirk's husband, asked him not to complain to or harass Owen's wife about his conduct, and stated, "I am entirely confident that neither you nor your wife would appreciate it if I were to seek out the opportunity to make your wife feel uncomfortable."

During the following month, Kirk's husband installed a video surveillance system at their property after Kirk became worried about possible vandalism. Kirk's husband also submitted a written complaint to the city animal shelter that described the problems they were having with Owen regarding his unwillingness to control his dog on or near their property. A few days later, Kirk noticed someone had removed wire plant cages that she had placed along her fence, and she suspected Owen was responsible because of a comment in the note he left on the truck a few days earlier.

The following month, Kirk and her husband were unloading their camper in the driveway when Owen walked by their house with his dog off leash. Kirk retrieved her camera and filmed Owen when he did not clean up after his dog. Owen shouted at Kirk and her husband while his dog ran up the driveway toward Kirk's son. Kirk put out her foot to stop the dog and shouted at it. Owen raised his right fist and shouted at Kirk not to kick his dog. After Owen left, Kirk called the police. While she was waiting for them to arrive, Owen returned and took photographs of Kirk's property and vehicles. Owen also pulled up wire cages Kirk had placed to support plants along the public path and threw them onto Kirk's property. Owen left when Kirk's tenant arrived and asked him to leave.

Kirk again called the police, who spoke to both parties and viewed video footage recorded by the surveillance system. The officers told Kirk she could not press charges of assault. It appeared to police that Owen did not attempt to hit Kirk. The officers also told Kirk that they advised Owen to stay away from her house. Later that evening, Kirk's tenant found a card and some flowers on the entry gate to the yard within Kirk's property. The card was a birthday card with a picture of a yellow Labrador dog (like Owen's) printed with the words "Do stuff. Don't get caught. Happy Birthday." The words were crossed out, and below them was written an instruction for Kirk's husband to check his e-mail. Kirk's husband viewed Owen's e-mail and read portions to Kirk. The e-mail stated it was an apology and claimed that Owen was not going to punch Kirk, but instead intended to throw dog feces at her. The e-mail concluded with Owen's offer to "physically restrain [his] dog from entering [Kirk's] driveway," but also stated, "I am

going to continue to live on this block and walk my dog past your house for the foreseeable future . . . .”

Kirk was worried and upset and had difficulty sleeping after these events. She was afraid for herself and her child, and was concerned that Owen would seek revenge, vandalize her property, or verbally and physically assault her and her family. Kirk sought a temporary restraining order and injunction under section 527.6. The court entered a temporary restraining order that required Owen to refrain from harassing or contacting Kirk or her son, and to stay at least 25 yards away from them, their home, and their vehicle. Owen opposed Kirk’s petition for a restraining order, and denied that his conduct came within the terms of the anti-harassment statute. In his attached declaration, Owen described certain details of the parties’ most recent encounter differently than Kirk did, but admitted that he raised his hand over his head when he thought Kirk tried to kick his dog. He also offered declarations from neighbors, and one from the Marin Humane Society attesting to his friendliness and good character and Bailey’s gentle disposition.

At the hearing on Kirk’s petition, the court heard Kirk and Owen describe their past interaction. The court declined to listen to an audiotape of the parties’ most recent encounter or to view a videotape. The court denied Kirk’s request for a personal conduct order that would have directed Owen not to harass or contact Kirk, but issued an order effective for three years that requires Owen to stay at least 25 yards away from Kirk, her son, and her home, “[w]hile on foot with or without Bailey.”<sup>3</sup> The court stated its order did not bar Owen from driving by Kirk’s property in his car. Both parties’ requests for attorney fees were denied. Owen timely appealed.

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<sup>3</sup> There appears to be an inconsistency between the court’s verbal order at the conclusion of the hearing, and the written order signed by the court. During the hearing, the court told Owen its order was “strictly limited to [Kirk’s] property and the distance you may come to it,” and advised him: “If you see Ms. Kirk and her son on the street, there will be no order prohibiting you from approaching them, but I think a word to the wise here, you may well want to turn and go the other way.” The court’s written order, by contrast, directs Owen to stay at least 25 yards away from Kirk, her son, or their home. Although Owen’s opening brief complains of the discrepancy, he does not seek to correct it. Instead, he seeks to reverse the order in its entirety.

## DISCUSSION

Section 527.6 authorizes the entry of a temporary restraining order and an injunction prohibiting harassment, which is defined as “unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.” (§ 527.6, subd. (b).) Unlawful violence is further defined as any assault or battery, and a credible threat of violence is “a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.” (§ 527.6, subds. (b)(1), (2).) A course of conduct is “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose . . . .” (§ 527.6, subd. (b)(3).) The statute provides that a hearing shall be held on the petition for an injunction, at which “the judge shall receive any testimony that is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment.” (§ 527.6, subd. (d).) The prevailing party may also be awarded costs and attorney fees. (§ 527.6, subd. (i).)

“The role of the court in a section 527.6 hearing does not differ from its role in other trial settings where the court is the trier of fact. It is the function of the trial court to draw inferences from the evidence and to base its findings thereon. [Citations.] Inferences may be drawn not only from the evidence but from the demeanor of witnesses and their manner of testifying.” (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110.)

Owen attacks the sufficiency of the evidence to support the judgment. “When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence,

contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.” (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted; see also *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912 [trial court’s decision to grant an injunction “will not be disturbed on appeal absent a showing of a clear abuse of discretion”].)

Owen first contends there was no evidence that his conduct threatened future harm to Kirk or her child. But the cases he cites to support his argument are distinguishable from this one because they involved single incidents that were unlikely to recur. In *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, the defendant was in an altercation with a hospital administrator concerning medical treatment provided the defendant’s mother while she was a patient in the hospital. (*Id.* at pp. 327-328.) The court concluded there was no evidence the defendant posed a threat of future harm to any Scripps Health employee, because he made no further threats of violence and his mother’s health care had been transferred to another provider. (*Id.* at p. 336.) Similarly, in *Russell v. Douvan* (2003) 112 Cal.App.4th 399, a single act of battery involving two attorneys who did not regularly interact with each other was insufficient to support issue of an anti-harassment injunction where there was no finding that future harm was reasonably probable. (*Id.* at pp. 400, 404.) Here, by contrast, the parties are neighbors with a history of confrontation, and the court could reasonably infer their pattern of interaction would continue absent court intervention. (Cf. *Scripps Health v. Marin*, *supra*, at p. 332.) While Owen characterizes the parties’ most recent encounter as “a one-time incident,” we cannot agree. The record indicates otherwise. Indeed, Owen’s most recent e-mail stated, “I am going to continue to live on this block and walk my dog past your house for the foreseeable future . . . .”

Owen also argues there was insufficient evidence that his conduct came within the statute’s definition of harassment. We disagree. The court’s finding of a credible threat of violence was supported by Kirk’s testimony that Owen raised his arm towards her, and Owen’s own e-mail admitting he did so because he intended to throw dog feces at Kirk.

The court could reasonably conclude that Owen's actions, in light of the parties' previous interactions, could constitute a credible threat of violence that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, while serving no legitimate purpose. (§ 527.6, subd. (b)(2).) We therefore need not consider whether illegal harassment was also shown under the "unlawful violence" or "course of conduct" prongs of the statute.<sup>4</sup> (§ 527.6, subds. (b)(1), (3).)

Finally, Owen contends the trial court erred by not allowing Owen a "full opportunity to defend himself" when it declined to listen to an audiotape of the parties' most recent encounter. Owen contends the tape contradicted Kirk's testimony that Owen harangued and insulted her, but there is sufficient evidence to support the restraining order without considering the character of Owen's verbal conduct during that encounter. Moreover, Owen had an opportunity to testify at the hearing, and the court repeatedly invited him to respond to all the evidence offered by Kirk. The court did not violate the statute's directive that it "receive any testimony that is relevant." (§ 527.6, subd. (d); cf. *Schraer v. Berkeley Property Owners' Assn.* (1989) 207 Cal.App.3d 719, 732-733 [anti-harassment injunction may not be issued solely on basis of parties' written submissions, and relevant oral testimony must be taken from available witnesses if offered]; *Ensworth v. Mullvain*, *supra*, 224 Cal.App.3d at p. 1110 ["Because the trial court in this case heard testimony from both parties before issuing the injunction, the hearing did not violate the dictates of *Schraer*"].)

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<sup>4</sup> Nor do we address the parties' arguments regarding whether there is substantial evidence that a reasonable person would have suffered substantial emotional distress due to Owen's conduct, or that Kirk herself suffered such distress, because that issue arises only in relation to the "course of conduct" prong of section 527.6, subdivision (b). We also deny Kirk's cursory request for attorney fees on appeal. The trial court denied both parties' requests for attorney fees, and Kirk has not argued error in that regard. Owen's request for attorney fees on appeal is also denied because Owen is not the prevailing party. (§ 527.6, subd. (i).)

### **DISPOSITION**

The order of the trial court is affirmed. Kirk is entitled to her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).) Both parties' requests for an award of costs and attorney fees on appeal pursuant to section 527.6, subdivision (i) are denied.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.